

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

TIMOTHY L. MORRIS)	
NILS GRONNINGSETER)	
LEONARD McMARTIN)	
SHIRLEY McMARTIN)	
DONALD MICHEL)	
R.J. LEE)	
NADINE LOWE)	
SEAN DUNN)	
CARMEN DUNN)	
on their own behalf)	
and on behalf of all others similarly)	
situated,)	
)	
Plaintiffs)	
vs.)	CASE NO. 5:11 CV0223
)	
HEAT SURGE LLC)	JUDGE BENITA Y. PEARSON
)	
Defendant)	

FIRST AMENDED CLASS ACTION COMPLAINT;

JURY TRIAL DEMANDED

I. Nature of the Case

1. Plaintiffs, by undersigned counsel, hereby institute this Class Action Complaint against defendant Heat Surge, LLC on their own behalf and as representatives of a class consisting of all persons who have purchased “World famous Amish Built Fireplaces and Mantles” since June 6, 2007 in response to advertising that implied the entire product was made in the United States. Plaintiffs bring this action to recover damages, restitution, refunds, and/or for equitable, injunctive and declaratory relief, against Heat Surge, LLC

II. Parties

2. Timothy L. Morris resides in Tupelo, Mississippi.

3. Nils Gronningseter resides in New Bern, North Carolina.
4. Leonard and Shirley McMartin reside in Thunder Bay, Ontario, Canada.
5. Donald Michel resides in McKeesport, Pennsylvania.
6. R. J. Lee resides in Kansas City, Kansas.
7. Nadine Lowe resides in Smithfield, Virginia.
8. Sean and Carmen Dunn reside in Lodi, Ohio.
9. Heat Surge, LLC is an Ohio Limited Liability Company with its headquarters at 3939 Everhard Road Northwest, North Canton, OH 44709-4004.

III. Jurisdiction

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 since this is a diversity class action lawsuit in which over \$5,000,000 is at issue.
11. The matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.
12. Members of the class are citizens of states different from defendant.
13. The claims asserted involve matters of national concern and involve interstate commerce.
14. No other class actions have asserted the same or similar claims presented in this case.

IV. Factual Allegations

15. Plaintiffs have all purchased from defendant since June 6, 2007, a Heat Surge Fireplace with genuine Amish Mantles in response to advertising that implied that the entire product was made in the United States.

16. Plaintiffs all purchased their Heat Surge Fireplace with genuine Amish Mantles after reading or viewing television advertisements similar to the advertisement attached to this complaint as plaintiffs' exhibit 1.

17. The ads falsely imply that the fireplaces are made in the United States of America when substantial components are made in China.

V. Class Action Allegations

18. Plaintiffs bring this action on their own behalf and as representatives of a class consisting of all persons who have purchased the Heat Surge Fireplace with allegedly genuine Amish mantles since June 6, 2007 in response to advertising that implies the product is made in the United States. Plaintiffs bring this action to recover damages, restitution, refunds, and/or for equitable, injunctive and declaratory relief, against Heat Surge, LLC

19. Plaintiffs seek certification of the claims asserted herein pursuant to Fed. R. Civ. Pro. 23(b)(2) and/or (b)(3) for equitable, injunctive, and declaratory relief.

20. The named plaintiffs are members of the Class they seek to represent.

21. The Class is so numerous that joinder of all members is impracticable. There are more than one hundred thousand persons who are members of this class.

22. There are questions of law and fact common to the Class including, but not limited to:

- a. Whether the defendant falsely implied that the fireplace heaters were made in the United States
- b. Whether the defendant committed fraud;
- c. Whether defendant breached the contract that it had with defendants;
- d. Whether the Uniform Commercial Code allows a refund;

e. Whether defendant committed a deceptive trade practice when advertising the Heat Surge product.

23. These and other questions of law and/or fact are common to the Class and predominate over any questions affecting only individual Class members.

24. The claims of the named Plaintiffs are typical of the claims of the respective Class they seeks to represent

25. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class he seeks to represent.

26. Plaintiffs have retained counsel competent and experienced in complex class actions to represent them and the members of the proposed Class. Accordingly, the interests of the Class will adequately be protected and advanced. In addition, there is no conflict of interest among Plaintiffs and the members of the proposed Class.

27. Counsel for Plaintiffs is and has been general counsel of the Made in the USA Foundation for twenty-two years, a non-profit organization dedicating to promoting products made in the United States. Mr. Joseph is one of the leading experts in the nation on the definition of products “Made in the United States.”

28. Class certification is appropriate pursuant to Fed. R. Civ. Pro. 23(b)(2) because Defendant has acted on grounds generally applicable to the Class, making appropriate injunctive and/or declaratory relief.

29. Class certification is also appropriate pursuant to Fed. R. Civ. Pro. 23(b)(3) because, as set forth above, common issues of law and fact predominate over any individual issues and certification of the claims as class claims is superior to other available methods for the fair and efficient adjudication of these claims. In addition, there would be enormous economies

to the courts and parties in litigating these common issues on a class-wide basis rather in individual trials. Plaintiffs foresee no difficulties in the management of this action as a class action.

VI. First Cause of Action: Fraud

30. Plaintiffs hereby restate and reallege each and every allegation set forth above with the same force and effect as if set forth herein and repeated at length.

31. Defendant intentionally and falsely implied that the Heat Surge Fireplaces are made in the United States.

32. Defendant knew that these misrepresentations were false.

33. Defendant intended to deceive the public about the country of origin of the heater.

34. Plaintiffs were damaged as a direct and proximate result of defendant's false and misleading advertisements.

VII. Second Cause of Action: Breach of Contract

35. Plaintiffs hereby restate and reallege each and every allegation set forth above with the same force and effect as if set forth herein and repeated at length.

36. The parties had a contractual arrangement. Plaintiffs paid for the Heat Surge Fireplace and Mantles.

37. Defendant had a contractual obligation to provide a fireplace that was made in the United States of America.

38. Defendant breached the contract that it had with plaintiffs.

VIII. Third Cause of Action: Deceptive Trade Practice

39. Plaintiffs hereby restate and reallege each and every allegation set forth above with the same force and effect as if set forth herein and repeated at length.

40. Defendant violated the Ohio Consumer Sales Practices Act by failing to disclose in advertising that its products include a heater that is made in China.

41. Defendant committed an unfair or deceptive act or practice in connection with a consumer transaction, selling the Heat Surge unit without disclosing that the heating element was made in China.

42. The Ohio Consumer Sales Practices Act requires the court to “give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts’ interpretations of subsection 45 (a)(1) of the “Federal Trade Commission Act,” 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.”

43. The practices of defendant violate the rules and orders of the Federal Trade Commission regarding country of origin disclosures and advertising.

44. Under Ohio Revised Code 1345, defendant committed deceptive trade practices actions by causing likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods in its Heat Surge Fireplace and Mantle.

45. Under Ohio Revised Code 1345 defendant committed deceptive trade practices actions by using deceptive representations or designations of geographic origin in connection with goods or services; in particular implying that the entire fireplace system is made in the United States when the heater is made in China.

46. Plaintiffs were damaged as a result of these misrepresentations by paying more than the goods were worth.

47. Plaintiffs are seeking damages and injunctive relief pursuant to Ohio Revised Code Section 4165.03.

IX. Fourth Cause of Action: Unjust Enrichment

48. Plaintiffs hereby restate and reallege each and every allegation set forth above with the same force and effect as if set forth herein and repeated at length.

49. Defendant's actions caused it to be unjustly enriched at plaintiffs' expense.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter a judgment against the Defendant and in favor of the Plaintiffs and the Class and award the following relief:

- A. That this action be certified as a class action on behalf of the proposed class described herein and that counsel of record be appointed to represent the class;
- B. That this Court award Compensatory and punitive damages, as the Court may determine.
- C. That this Court award Costs, including experts' fees and attorneys' fees and expenses, and costs of prosecuting this action.
- D. Such other further relief as the Court deems just and proper.

JOEL D. JOSEPH
Member of the Bar of the United States
District Court for the Northern District of Ohio
Attorney for Plaintiff
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DEMAND FOR JURY TRIAL

Plaintiffs, on behalf of themselves, and all others similarly situated, hereby demand a jury trial.

JOEL D. JOSEPH

PLAINTIFFS' EXHIBIT 1

New Today

ADVERTISEMENT

World famous Amish built fireplace mantles now being given away free

After about a million sold, nearly perfect Scratch-N-Dent models of the world famous Amish built fireplace mantles are now being given away free to the first 11,382 readers who call to beat the order deadline for the miracle heaters that let you turn your furnace off earlier this year

Slash your Heat Bills: Miracle invention uses only a trickle of electricity while you relax in front of the soothing glow of a fire, then turn your thermostat way down and with the push of a button get a constant heat wave using about the same energy as a coffee maker and never be cold again

By LAUREN RICH
Universal Media Syndicate

(UMS) If you just got stung with another high heat bill you better hurry and get in on this free giveaway.

Today, for the first time ever beautiful Scratch-N-Dent models of the world famous Heat Surge® Miracle Fireplace mantles are actually being given away free to the general public.

The only thing today's readers need to do is call the Toll Free Hotline before the deadline starting at precisely 8:00am this morning to order the miracle heaters. Everyone who does will instantly be awarded the genuine handmade Amish oak Fireplace mantle absolutely free.

"This is all happening because the Amish craftsmen who have already built nearly a million of these mantles take great pride in their work so not all mantles make the final grade. Others can be nicked during handling after they leave the Amish workshops," said Chris Gallo, Heat Surge spokesman.

"We think they are way too hard on themselves, but that's how we are able to set aside hundreds of these nearly perfect units to give away free," Gallo said.

"These are the newest Heat Surge Fireless Flame® Fireplace models. Call them whatever you want, refurbished, reconditioned, nearly new, but chances are you will never find the flaw, it could be on the

firebox or the mantle, but usually smaller than a thumb nail. Since the mantles also get labeled nearly perfect we are giving them away free," Gallo said.

"It's the buzz around town. Yes, the Amish craftsmen need to earn money like everyone else but they are willing to take less for their work so that everyone can get one. It shows we care. The overriding goal is to help as many people as possible to substantially cut their heat bills now and next fall by allowing everyone to turn down their thermostat," Gallo said.

As we look forward to enjoying the summer, there will be that monster lurking in the shadows: HIGH HEATING BILLS. They are again just a few short months away. So if your heat bills sting right now, just think how bad they could hurt next year.

"Giving these away now is about the best way to prepare everyone for what is coming. So if you thought you couldn't afford the World Famous Heat Surge Fireplace, now is the time to get in on this," Gallo said.

"Everyone wants them now because by next fall, this free giveaway will be long gone," he said.

Don't let anyone talk you into anything else. Those others are just imitations. These are the Heat Surge Fireplaces with genuine Amish Mantles that actually roll from room to room to give you the huge savings with zone heating.

A special High-Tech on board



PICKY, PICKY: "If it's not perfect, give them away free," said the elder Amish craftsman. That's why these nearly perfect genuine Amish built fireplace mantles made in the USA are being given away free to the first 11,382 readers who call 1-888-226-6504 to beat the order deadline for the world famous Heat Surge Fireless Flame miracle heaters that can drastically slash your heat bills. The miracle invention rolls from room to room with no chimney, no vents, no wood, no mess and no smoke. Just plug it in and relax in front of the Fireless Flame.

computer controls what's called the Fireless Flame that gives you the peaceful flicker of a real fire but without any flames, fumes, smells, ashes or mess. Everyone is getting them because they require no chim-

ney and no vent. You just plug it in.

The patented Fireless Flame looks so real it fools everybody but it has no real fire. The mantles are handmade in the USA right in the heart of Amish country where

ADVERTISEMENT

they are beautifully hand-rubbed, stained and varnished.

Thousands of people from California and Florida even flock to get them because they may never have to turn on their furnace. And since the standard setting uses only 750 watts, about the same energy as a coffee maker the potential savings are absolutely incredible.

"That way, everyone who gets

them now can immediately start saving on their heat bills. You'll instantly feel bone soothing heat in any room. You will never have to be cold again," he said.

"We'll do everything we can so no one gets left out. But, if you miss out

today, your last chance is tomorrow to get in on this free giveaway of the world famous Heat Surge Fireplace mantle, but you also get the patented *Fireless Flame* miracle heater free of next year's dealer mark up. After they are gone we have to turn

everyone away," confirms Gallo.

"So when lines are busy keep trying. We promise to get to every call. Then we will have a delivery truck out your door right away with your beautiful Amish made Heat Surge Roll-n-Glow® Fireplace," Gallo said. ■

ACCEPT NO IMITATIONS

This is the one and only authentic
HEAT SURGE®
Fireless Flame™



How It Works: The HEAT SURGE miracle heater is a work of engineering genius so advanced, you simply plug it into any standard outlet. Based upon the national average it uses only about 9¢ of electric an hour on the standard setting. Yet, it produces up to an amazing 5,119 BTU's on the high setting. So watch out, a powerful on board Hi-Tech heat turbine silently forces hot air out into the room from the vent so you feel the bone soothing heat instantly. These nearly perfect Scratch-N-Dent fireplaces also come with a limited full year replacement or money back warranty plus a 30-Day Satisfaction Guarantee.

8000 FREEDOM AVE.,
N. CANTON OH 44720

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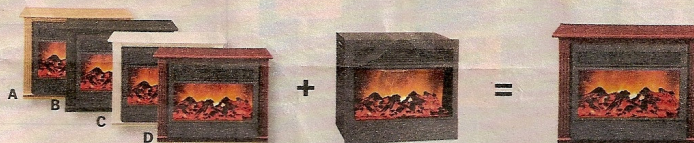
Today's readers need to call the Toll Free Hotline beginning at 8:00am today. If lines are busy keep trying, all calls will be answered.

All those who beat the deadline to cover just shipping and the Miracle Heater firebox get them installed in the Free Amish built fireplace mantle.

There is a strict limit of two units per household only with a valid Free Claim Code.

This Free giveaway is for two days only. Today, 8,764 will be given away and only 2,618 will be given away tomorrow. When they are gone, they are gone.

www.heatsurgeoutlet.com



1. Choose your Solid Wood Mantle:

A. Country Oak	\$298	NOW FREE
B. Modern Black	\$348	\$48 custom finish fee
C. Classic White	\$348	\$48 custom finish fee
D. Cherry Manor	\$338	\$38 custom finish fee

2. The Fireless Flame Miracle Heater

Firebox with on Board Computer free of dealer mark up now for just \$249 with FREE Scratch-N-Dent fireplace mantles claimed before the deadline.

3. Your beautiful Heat Surge Roll-n-Glow® Fireless Flame Fireplace

comes fully assembled by Amish craftsmen and gets delivered right to your door. All you do is roll it out of the crate and plug it in.

OH and FL resident transactions require the remittance of applicable sales tax. Sorry no shipments to MA residents.

Miracle invention rolls from room to room with no chimney, no vents, no wood and no smoke



■ **THE BRAINS BEHIND THE BEAUTY:** This is the High Tech computer board that controls the patented *Fireless Flame* technology developed by Asian engineers. Since the Amish don't make the firebox computer, it's the only cost you have to cover because they are giving all of the Scratch-N-Dent Amish built mantles away for free.



■ **EASILY ROLLS ANYWHERE:** This is the Heat Surge Roll-n-Glow® Fireplace that is so portable it easily rolls from bedroom to living room to keep you warm everywhere. No vents, no chimney and no tools. Just plug it in.



■ **SAVE ON BILLS:** Everyone can get low bills and stay warm and cozy. Naomi Abrams' new Heat Surge Roll-n-Glow® Fireplace saves a ton of money and makes her front room look like a million bucks. "It was a surprise from my husband," she said.



■ **SAFE FLAME:** The Heat Surge patented *Fireless Flame* looks so real it fools everyone but there is no real fire. That makes the flame window safe to the touch. It's where the kids will play and the cat and dog will sleep.